IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	)	Case No. 4:05-cv-00329-GKF-SAJ

MOTION OF TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., CARGILL TURKEY PRODUCTION, LLC, AND CARGILL, INC. FOR PARTIAL JUDGMENT AS A MATTER OF LAW BASED ON PLAINTIFFS' LACK OF STANDING AND INTEGRATED OPENING BRIEF IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 12(c), Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (the "Tyson Defendants") and Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Cargill Turkey Production, LLC, and Cargill, Inc., respectfully move this Court to dismiss counts 2, 4, 6 and 10 of Plaintiffs' First Amended Complaint ("FAC"). In those claims, the State of Oklahoma seeks damages and injunctive relief based on alleged injury to all properties and natural resources located in the Illinois River Watershed ("IRW" or "Watershed"), without limitation.. It is irrefutable, however, that Oklahoma neither owns nor holds in trust the majority of the properties or resources in the IRW and, therefore, lacks standing to pursue certain claims. Accordingly, this Court should enter an order dismissing counts 2, 4, 6 and 10.

I. INTRODUCTION

Oklahoma seeks monetary, injunctive and declaratory relief for alleged environmental injuries to all the property and natural resources located in the one-million-plus acre IRW, *see* FAC ¶ 22, "including the biota, lands, waters and sediments therein," allegedly caused by the longstanding agricultural practices of independent poultry producers who have contracts with the Tyson Defendants. *Id.* ¶ 3. Oklahoma seeks recovery under, *inter alia*, the natural resource damage ("NRD") provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75, FAC ¶¶ 78-89 (Count 2), Oklahoma state law theories of nuisance, *id.* ¶¶ 98-108 (Count 4), trespass, *id.* ¶¶ 119-27 (Count 6), and unjust enrichment, *id.* ¶¶ 140-47 (Count 10).

Oklahoma also alleges that the entire one-million-plus acre IRW, including all the farms, houses, cities and towns therein, "the grower buildings, structures, installations and equipment,

as well as the land to which the poultry waste has been applied," constitutes a single "facility" under CERCLA. *See* FAC ¶¶ 72, 81. Given the unprecedented sweeping nature of that allegation, Defendants petitioned this Court to order Plaintiffs to clarify the geographic scope of their FAC. *See* Defendants Motion for a More Definite Statement With Respect to Counts One and Two of the Amended Complaint (Dkt. No. 71) (Oct. 3, 2005). The Court recently denied that request for clarification, noting that Oklahoma's allegations clearly claim to cover every square inch of land in the IRW. *See* Order and Opinion (Dkt. No. 1061) at 2-3 (Feb. 26, 2007). The Court expressly declined to address the merits of Oklahoma's extraordinary allegations.

Oklahoma freely admits that approximately half the IRW lies within the State of Arkansas. *Id.* ¶ 22. Nonetheless, Oklahoma asserts blanket powers and unrestricted jurisdiction over the entire IRW as an alleged titleholder or trustee of all its "biota, lands, waters and sediments" in both states. *See, e.g.*, FAC ¶ 22 (alleging that Defendants' conduct has caused "injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma.") Based on these alleged injuries, Oklahoma seeks to compel Defendants to "remediate the IRW" and requests injunctive relief to control or abate alleged pollution-causing conduct throughout the entire IRW. *See, e.g.*, FAC ¶¶ 96, 116, 147. As a matter of law, however, the majority of the property and natural resources at issue here is owned or held in trust by other persons or entities, including the State of Arkansas, the federal government, private citizens, corporations and municipalities. The State of Arkansas and the Arkansas Natural Resources Commission have moved to intervene in this case to protect the rights of the State of

Arkansas and its citizens. *See* Dkt. No. 499 (May 2, 2006). That motion is pending and ripe for decision.

Stated simply, Oklahoma lacks standing to pursue its sweeping claims for alleged damages or injunctive relief with respect to properties and natural resources that it does not own or hold in trust. Accordingly, the Court should enter an order pursuant to Rule 12(c) dismissing those claims. The entry of such an order at this stage of the litigation will greatly expedite this case and ease the unjustified discovery burdens that Oklahoma's baseless claims impose on the parties and the thousands of non-parties who are owners or trustees of properties and natural resources within the IRW.

II. LEGAL STANDARDS

When pleadings are closed, a party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). A court evaluates a judgment on the pleadings as it does a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000). While the Court must accept all well-pleaded factual allegations as true and view them in a light most favorable to the plaintiff, *Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999), dismissal is required when it "'appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

For its claims to be justiciable in federal court, a plaintiff must establish "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy Article III standing, a plaintiff must demonstrate three elements. First, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.*

(citations, footnote, and quotations omitted). Second, a plaintiff must show a "causal connection between the injury and the conduct complained of . . . ." *Id.* This requires an "injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Finally, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (internal citation omitted). Oklahoma bears the burden of demonstrating that each of its claims satisfies all three elements, including that the State is seeking to recover for an injury to its own legally protected interests and not the interests of another. *Id.*

Applying the Supreme Court's criteria, the federal courts have made clear that a plaintiff cannot assert a claim of injury to property that it does not own or hold in trust. *See, e.g.*, *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006) (finding that plaintiff lacked standing to pursue private RICO and antitrust suit because he "cannot assert personal injury based on the condemnation of property he did not own . . ."); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848 (9th Cir. 2001) ("Although [plaintiff] may have legitimate objections to the IOLTA program and may believe his clients are better served by disregarding its dictates, he does not own the principal that is deposited in the IOLTA accounts, and therefore, he has no claim to the generated interest. Without the requisite property right, [plaintiff] lacks standing to challenge the IOLTA program on Fifth Amendment grounds."); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 297-300 (S.D. Ala. 2006) (named class representatives suffered no injury in fact because they did not own any property within the allegedly contaminated area described in toxic tort class action suit, and thus lacked standing); *Deitz v. Comcast Corp.*, 2006 WL 3782902, at *4 (N.D. Cal., Dec. 21, 2006) (applying *Lujan*'s standing requirements to a case

asserting unjust enrichment); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 645-51 (S.D. Ala. 2005) (applying *Lujan*'s standing requirements to a case asserting trespass from alleged environmental contamination).

Since standing is a constitutional and jurisdictional requirement, a party may raise it at any time, including on a motion for judgment on the pleadings. *See Bd. of County Comm'rs v. W.H.I., Inc.*, 992 F.2d 1061, 1063 (10th Cir. 1993) ("Standing may be raised any time in the judicial process."); *Ward v. Utah*, 321 F.3d 1263, 1267-70 (10th Cir. 2003) (ruling on whether plaintiff suffered an injury in fact and, therefore, had standing to challenge Utah's hate-crime statute raised by a motion for judgment on the pleadings).

III. ARGUMENT

Oklahoma sues for monetary damages and injunctive and declaratory relief for alleged injury to the entire IRW. *See, e.g.*, FAC ¶¶ 3, 5, 22, 31. Oklahoma's claims thus encompass alleged injuries to all property and every natural resource within both the Oklahoma and Arkansas portions of the IRW—including family farms and residences, corporate holdings, municipal properties and federal properties (such as the Wedington Division of the Ozark National Forest). Oklahoma, however, does not differentiate the State's supposed interests in property ownership and natural resource trusteeship within the IRW from the ownership and trusteeship interests of others. Significantly, Oklahoma even claims it is entitled to damages for alleged injury to property wholly within the State of Arkansas.

Given that thousands of separate individuals and entities other than the State of Oklahoma own properties and hold natural resources within the IRW, Defendants have repeatedly pressed the State to narrow its claims. *See* Defendants' Motion for a More Definite Statement With Respect to Counts One and Two of the Amended Complaint (Dkt. No. 71) (Oct. 3, 2005); Defendants' Motion for Entry of Case Management Order (Dkt. No. 946) (Oct. 17,

2006). For nearly two years, Oklahoma has consistently and stubbornly opposed these efforts. *See* Response in Opposition to Defendants' Motion for a More Definitive Statement (Dkt. No. 131) (Nov. 18, 2005); Response in Opposition to Defendants' Motion for Entry of a Case Management Order (Dkt. No. 978) (Nov. 13, 2006). This Court has noted that Oklahoma's "position on the issue is not vague or ambiguous." Order and Opinion (Dkt. No. 1061) at 3 (Feb. 26, 2007). Rather, Oklahoma has clearly claimed standing to litigate on behalf of all properties and natural resources within the IRW. *See id.*

As a matter of law, Oklahoma lacks a protected legal interest in the vast majority of properties and natural resources within the IRW and, therefore, cannot claim any injury in fact as to those properties and natural resources. Further, Oklahoma has doggedly refused to narrow its claim to the entire IRW and has insisted on all-or-nothing IRW standing. Hence, as Oklahoma simply cannot have standing as to all of the IRW, this Court is constrained to find that the State has standing as to none. As a result, many of Oklahoma's claims do not satisfy basic Article III standing requirements and must be dismissed.

A. Oklahoma Is Not The Owner Or Trustee Of All The IRW's Lands And Natural Resources

It is beyond dispute that most of the land and water within the IRW is held by individuals, corporate entities, municipalities, the State of Arkansas, and the federal government. Oklahoma willfully overlooks the interests of these third-party landowners and trustees. Without an ownership or trusteeship interest over each property and natural resource, Oklahoma could not have suffered an injury from the alleged contamination of the IRW and, therefore, lacks standing for many of its claims and much of the relief it seeks.

1. Much Of The Property In The IRW Is Owned Or Held In Trust By Private Parties, Many Of Whose Interests Are Opposed To Oklahoma's Lawsuit

Oklahoma boldly claims that it "has suffered injury to the IRW, including the biota, lands, waters and sediments therein . . . ." FAC ¶ 3. Yet, Oklahoma's own pleadings make clear that the vast majority of the IRW is owned by other parties. For example, Oklahoma explicitly alleges that the IRW includes "the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied . . . ." FAC ¶ 81; *see also id.* ¶¶ 48-51 (describing the alleged litter storage and litter application practices of independent poultry producers "on lands within the IRW"). As Oklahoma concedes, all these properties are privately owned.

Oklahoma's other judicial submissions also concede the fact that extensive portions of the IRW are held by private landowners. In fact, Oklahoma raised the interests of private landowners in the State's request for expedited discovery. *See* Motion for Leave to Conduct Limited Expedited Discovery and Brief In Support (Dkt. No. 210) (Feb. 22, 2006). There, the State sought access to the privately-owned farms of independent poultry producers who had contracts with Defendants, complaining that the State's soil and rainwater sampling "effort was limited due to the fact that the State of Oklahoma only had access through public rights of way." *Id.* at 3. Thus, despite claiming an interest in the entire Watershed, Oklahoma acknowledged that it could not set foot on large portions of the IRW without this Court's permission. The State's motion for expedited discovery and the ensuing response by private poultry growers further detailed the legitimate property interests of farmers and other private property holders in the IRW. *See generally* Objections and Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, Or Alternatively, Motion for Protective Order (Dkt. No. 493) (May 1, 2006) (attaching subpoenas that included copies of deeds to the poultry

growers' property); Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, Ren Butler and Georgia Butler, or Alternatively, Motion for Protective Order and Brief in Support (Dkt. No. 539) (May 4, 2006) (attaching subpoenas that included copies of deeds to the poultry growers' property); *see also* Transcript of Motion Hearing (Dkt. No. 779) (June 5, 2006) at 35 (attorney for poultry growers described Oklahoma's sampling efforts as "this invasion, this assault, as far as my clients are concerned, on their property rights . . ."); *id.* at 40 (arguing that the State's "pocking" of the poultry growers' land through removal of soil samples is a use of eminent domain requiring compensation). In its ruling, the Court noted that it was addressing arguments raised by "[s]everal non-parties to this action who own property" within the IRW. Order (Dkt. No. 757) (May 31, 2005) at 3.

Although the third-party practice is still in its early stages, the pleadings of Oklahoma and others in the third party cases have made clear that much of the IRW is held as private property. In the third-party cases, a number of Defendants filed third party complaints against more than 180 corporate entities, private trusts and municipalities that own land within the IRW in Oklahoma. *See* Third Party Complaint (Dkt. No. 82) (Oct. 4, 2005) (attaching deeds for third party defendants' properties). Oklahoma acknowledges that private businesses, citizens and municipalities own land within the IRW. *See, e.g.*, Motion to Sever, Stay, Strike or Dismiss the Third Party Complaint at 2 n.2 (Dkt. No. 247) (Apr. 3, 2006) ("The third-party defendants' activities are alleged to range from owning a septic system, to hay production, to operating nurseries, to operating gravel, sand and limestone mines, to operating lawn care services, to operating golf courses, to grazing cattle, to operating RV parks and campgrounds, to operating rental cabins and motels, to operating marinas and canoe and raft rentals, to operating cafes."). Moreover, the map attached to the FAC underscores the presence of private landowners within

the IRW. *See* FAC, Ex. 1 (Dkt. No. 2) (June 13, 2005) (map attached to FAC showing Oklahoma towns within the IRW, including Park Hill (population 3,936), Stillwell (population 3,276), Tahlequah (population 14,458), Watts (population 316) and Westville (population 1,596)); *see also* U.S. Census Bureau Database for Oklahoma, *available at* http://quickfacts.census.gov/cgi-bin/qfd/demolink?40 (last visited Jan. 12, 2007).

Oklahoma cannot, as a matter of law, maintain any claim for alleged harm to the land, water, and other resources within the IRW which it does not own or hold in trust.

2. Oklahoma Is Not The Proper Natural Resource Trustee Over The IRW Within Arkansas

Oklahoma concedes that approximately half of the IRW lies within Arkansas. *See* FAC, Ex. 1; *id.* ¶ 22 (alleging that only 576,030 of the IRW's 1,069,530 acres "are located in Oklahoma"). Despite its broad claims for injuries to the entire IRW, *see* FAC ¶¶ 96, 116, 147, Oklahoma does not allege that it owns property within the State of Arkansas. Moreover, as a matter of law, Oklahoma does not hold in trust any of the natural resources located within Arkansas.

Under CERCLA, a state may only serve as an NRD trustee for those "natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State . . . ." 42 U.S.C. § 9607(f)(1); *see also* 42 U.S.C. § 9607(f)(2)(B); 40 C.F.R. § 300.605 ("State trustees shall act on behalf of the public as trustees for natural resources, including their supporting ecosystems, within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state."); U.S. Environmental Protection Agency, NRD Trust Resources, *available at* http://www.epa.gov/superfund/programs/nrd/trust_r.htm (last visited Mar. 11, 2007) (EPA explaining that, under CERCLA, each state has its own CERCLA NRD trustee for natural resources, including ground and surface water, within the boundaries of that state). The State of

Arkansas has the responsibility to designate the natural resources trustee for the State of Arkansas, and it has designated the Director of the Arkansas Department of Environmental Quality, not Oklahoma Plaintiff Miles Tolbert. *See, e.g.*, Ark. Code Ann. §§ 8-4-103(b); 8-5-702(e); 8-6-204(b), (c); 8-7-204(b), (c); 8-7-806(d), (e). Simply put, Oklahoma lacks standing to pursue damages or injunctive relief for alleged injuries to lands or natural resources located in the State of Arkansas.

3. Oklahoma Is Not The Natural Resource Trustee Over Federal Properties

Similarly, as a matter of law, Oklahoma does not hold in trust any of the properties or natural resources owned or administered by the United States government, even where those properties or natural resources are located within Oklahoma. Under CERCLA, the President of the United States designates the federal agency that serves as natural resource trustee for federal properties and resources. *See* 42 U.S.C. § 9607(f)(2)(A); http://www.epa.gov/superfund/programs/nrd/trust_r.htm (EPA explaining that "CERCLA §107(f)(2)(A) requires the President to designate in the National Contingency Plan . . . Federal officials who are to act on behalf of the public as Trustees for natural resources under Federal trusteeship."). No state may serve as the natural resource trustee for federal assets. *See* 42 U.S.C. § 9607(f)(2)(B).

The IRW contains thousands of acres of federal land. For example, the Wedington Division of the Ozark National Forest lies within the IRW. *Compare* Ozark Nat'l Forest Rec. Area Locator Map *available at* http://www.fs.fed.us/oonf/ozark/maps/ozarkmap2.htm[1] *with*

[1] The Court may take judicial notice of this National Forest Service map. Federal Rule of Evidence 201(b) provides that "a judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Facts subject to judicial notice include facts that are a matter of public record. *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), abrogated on other grounds by *McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001). Courts may consider such facts in a Rule 12(b)(6) or Rule 12(c) motion without converting it into a motion for summary judgment. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d

FAC, Ex. 1. The President has designated the United States Department of Agriculture as the CERCLA NRD trustee for federal forest lands. *See* 40 C.F.R. § 300.600; http://www.epa.gov/superfund/programs/nrd/trust_r.htm. Hence, Oklahoma lacks standing to pursue relief for any alleged injury to federal lands or resources within the IRW.

B. Oklahoma Lacks Standing To Assert Many Of The Claims In The FAC Because Oklahoma Is Not The Owner Or Trustee Of The IRW's Lands And Natural Resources

Because Oklahoma neither owns nor holds in trust much of the lands and natural resources it claims have been damaged, Oklahoma lacks standing to bring many of its claims.

1. Oklahoma Lacks Statutory And Constitutional Standing To Maintain Its CERCLA Natural Resources Damage Action

As noted above, FAC Count 2 asserts a claim for natural resource damages under CERCLA. *See* FAC ¶¶ 78-89. In support of this claim, Oklahoma summarily alleges that the State's Secretary of the Environment is the sole natural resource trustee for all natural resources within the IRW. *See* FAC ¶ 85 (seeking damages for injury to "the IRW, including the lands, waters and sediments therein . . . including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma."); *see also id.* ¶ 5 (claiming "without limitation, [ ] an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams" and "all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public"). As a matter of law, this allegation is patently false.

CERCLA allows recovery for damaged "natural resources," defined as the

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1276, 1278 n.1 (10th Cir. 2004) (citing 27A Fed. Proc. § 62:250 (2003); *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000)

> land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government . . . .

42 U.S.C. § 9601(16); *see also id.* § 9607(f)(1) (allowing recovery for injured natural resources by the United States or a State serving as natural resource trustee).

When setting regulations for assessing natural resource injuries, the Secretary of the Interior explained that, under CERCLA, "trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control." 59 Fed. Reg. 14,262, 14,268 (Mar. 25, 1994). Trusteeship is "determined on a case by case basis depending on who the resource belongs to, who it is managed by, who controls the same and how the resource appertains to other resources." *Coeur D'Alene Tribe v. ASARCO, Inc.*, 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003). Under CERCLA, Oklahoma is not the trustee over lands and natural resources that belong to the State of Arkansas. *See id*. at 1116 ("[A] given trustee cannot recover more than what its stewardship is determined to be. To allow otherwise would create the undesirable situation of a race to the courthouse between co-trustees with the first in time being the first in right.").

Neither the Oklahoma Attorney General nor the Oklahoma Secretary of the Environment may maintain an action for natural resource damages in which they have no legal interest. *See* 59 Fed. Reg. at 14,268 ("CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control."). As Oklahoma acknowledges, half the IRW lies within Arkansas. S*ee* FAC ¶ 22. Accordingly, Arkansas, and not Oklahoma, is the proper natural resources trustee for that portion of the IRW. *See* 42 U.S.C. § 9607(f)(2)(B). As a consequence of Oklahoma's refusal to narrow its natural resource damage claim, Count 2, FAC ¶¶ 78-89, must be dismissed.

2. Oklahoma Lacks The Exclusive Ownership Interests Necessary To Maintain Its Action For Trespass

Count 6 of the FAC asserts a common law trespass theory. *See* FAC ¶¶ 119-27. Oklahoma's trespass claim fails, however, because (1) Article III requires that a person own the property in question to assert this claim, *see, e.g.*, *LaBauve*, 231 F.R.D. at 645-51, and (2) the elements of the claim itself require that the plaintiff hold an exclusive possessory right.

a. Oklahoma Lacks Standing To Assert A Trespass Claim For The Lands Of The IRW

The State claims that Defendants are responsible for a physical invasion of its property interests within the IRW. FAC ¶ 120. However, Oklahoma lacks standing to pursue a trespass claim for any real property it does not own. Oklahoma law is well settled that "trespass involves an actual physical invasion of the property of another," *Fairlawn Cemetery Assoc. v. First Presbyterian Church of Oklahoma City*, 496 P.2d 1185, 1187 (Okla. 1972), and only the owner of the invaded property can sue to enjoin the trespass and recover damages. *See, e.g.*, *Tal*, 453 F.3d at 1254; *Wash. Legal Found.*, 271 F.3d at 848; *Fisher*, 238 F.R.D. at 297-300; *see also Peterson v. City of Broken Arrow*, 5 F.3d 547 (table), 1993 WL 345532, at *1 (10th Cir. Aug. 27, 1993) ("We note initially that the district court addressed the merits of plaintiff's state law causes of action for trespass and malicious destruction of property. Nonetheless, because plaintiff has failed to allege that he had a property interest in his mother's apartment, he lacks standing to assert these causes of action."); *accord New Mexico v. Gen. Elec.*, 467 F.3d 1223, 1237-38 (10th Cir 2006); *aff'g* 335 F. Supp. 2d 1185, 1234-35 (D. N.M. 2004).

As noted above, the IRW includes land in both Arkansas and Oklahoma. In Arkansas, the IRW stretches through Benton, Washington and Crawford Counties. In Oklahoma, the IRW covers portions of Delaware, Adair, Cherokee, and Sequoyah Counties. *See* FAC ¶ 22 & Ex. 1. Accordingly, the Watershed encompasses significant portions of land owned by the State of

Arkansas, private citizens, municipalities, and the federal government. Given the obvious exclusive ownership interests of parties other than the State of Oklahoma within the IRW, the State lacks standing to maintain claims for alleged injury to these lands. Moreover, Oklahoma fails to identify which properties, if any, it actually owns. Instead, the State asserts the rights of everyone. Oklahoma cannot pursue an action for trespass unless it proves an exclusive ownership interests in real property within the Watershed. *See Tal*, 453 F.3d at 1254; *Wash. Legal Found.*, 271 F.3d at 848; *Fisher*, 238 F.R.D. at 297-300; *see also Peterson*, 1993 WL 345532, at *1. Accordingly, because Oklahoma will not narrow its trespass claim to those lands, if any, that the State actually owns or holds in trust, Oklahoma's claim for trespass to the IRW's lands (Count 6, FAC ¶¶ 119-27) must be dismissed.

b. Oklahoma Lacks Standing To Assert A Trespass Claim For The Natural Resources Of The IRW

In addition to alleging trespass to the IRW's lands, the State alleges the physical invasion of, and interference with, the IRW's natural resources. *See* FAC ¶ 120 (alleging an "actual and physical invasion of and interference with the State of Oklahoma's property interests in the IRW, including the biota, lands, waters and sediments therein"). Blanket claims of dominion over all the natural resources, however, are inadequate to support a trespass action because undeniably many others hold rights in these lands and natural resources. For example, under Oklahoma law, groundwater and diffuse surface water within the IRW belong to many individual landowners, not the State—subject to beneficial use. *See* 60 Okla. Stat. § 60; *see also Messer-Bowers Co. v. Oklahoma*, 8 P.3d 877, 879 (Okla. 2000). Stream water is "public water," but it "is subject to appropriation for the benefit and welfare of the people of the state as provided by law." 82 Okla. Stat. § 105.1A; see also *Messer-Bowers*, 8 P.3d at 879. The people of Oklahoma are entitled to appropriate this water for "domestic uses." 82 Okla. Stat. § 105.1A. Accordingly, while the

State may administer the use of these natural resources,[2] under its own law Oklahoma does not have exclusive possession over these waters.

The United States District Court for the District of New Mexico recently rejected a state's trespass claim under similar circumstances to those here. In *New Mexico v. General Electric*, 335 F. Supp. 2d 1185, 1231-35 (D. N.M. 2004), *aff'd* 467 F.3d 1223 (10th Cir. 2006), the State of New Mexico filed suit for trespass to recover damages for allegedly contaminated groundwater. New Mexico's laws governing use and ownership of waters are similar to Oklahoma's, in that (1) a landowner also owns the groundwater beneath his or her property subject to a duty to avoid waste or cause a public nuisance, (2) the general public has rights to the water, and (3) the State administers the appropriation of waters. *Compare New Mexico*, 335 F. Supp. 2d at 1232-33 (describing New Mexico law), *with* 60 Okla. Stat. § 60 ("The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream."); 82 Okla. Stat. § 105.1A (Stream water "is subject to appropriation for the benefit and welfare of the people of the state as provided by law."); *id.* § 105.2 ("Any person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises."); *id.* § 105.17 (all water unused by a permit holder reverts to the public); *id.* § 105.22 ("All water used in this state for irrigation purposes shall remain appurtenant to that land upon which it is used . . . ."); *id.* § 105.29 (describing rights of the United States to appropriate waters); Okla. Att'y Gen. Op. No. 78-170 (July 31, 1978) ("All rivers, streams, creeks and waterways within the State of Oklahoma forming a definite stream or course are public waters, subject to appropriation by the State for the benefit and welfare of the people. Riparian owners along the waters forming a definite stream, navigable or

[2] *See, e.g.*, 82 Okla. Stat. §§ 105.1-18; Okla. Admin. Code § 785:20-1-6 (the Oklahoma Water Resources Board may appropriate water for "beneficial" uses).

non navigable may not fence across said waters for the purpose of limiting public use thereof; however, riparian owners may take reasonable action to prevent physical trespass upon their property by those persons seeking access to public waters.").

The District Court rejected New Mexico's claim that it had "proprietary interests in its natural resources" and its assertion that "in its role as public trustee [it] has a sovereign interest in its water resources making it the proper party . . . as *parens patriae* in bringing a trespass action for actual damage to the public's water supply." 335 F. Supp. 2d at 1232 (quotations omitted). The court held that, without alleging an intrusion onto state-owned land or the waters beneath that land, *id.* at 1233-34, or impairment of specific state-owned water rights, *id.* at 1234, New Mexico did not have any proprietary interests protected by the common law of trespass. "These [sovereign, public trust and *parens patriae*] interests fall outside the scope of the law's protection traditionally afforded to private landowners' right of exclusive possession by the law of trespass." *Id. See also* Prosser and Keeton on the Law of Torts § 13, at 67 (5th ed. 1984) ("In the bundle of rights, privileges, powers, and immunities that are enjoyed by an owner of property, perhaps the most important is the right to exclusive 'use' of the realty.").

Like the State of New Mexico, Oklahoma has nakedly declared *parens patriae* standing and that its sovereign status affords it, "without limitation, . . . an interest in" the IRW's natural resources. FAC ¶ 5. As a matter of law, this is not sufficient to support an action for trespass. "Absent the pleading of an exclusive possessory legal interest pertaining to the [natural resources] in question . . . Plaintiffs cannot maintain a common-law cause of action for trespass against those who have allegedly contaminated the public's" natural resources. *New Mexico*, 335 F. Supp. 2d at 1234. Accordingly, Oklahoma's claim for trespass to the IRW's natural resources (Count 6, FAC ¶¶ 119-27), must be dismissed in its entirety.

C. Oklahoma Lacks Standing To Bring A Nuisance *Per Se* Claim For Lands Or Waters It Does Not Own Or Hold In Trust

Oklahoma's nuisance claim suffers from the same defects. Oklahoma does not have constitutional standing to bring this claim because it does not meet the ownership or trusteeship requirement of the claim.

Oklahoma alleges that the actions of independent poultry producers who have contracts with Defendants have created a nuisance *per se* under 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. FAC ¶¶ 103-04. Oklahoma seeks to remediate this nuisance throughout the lands and waters of the IRW. See FAC ¶¶ 98-108. By their express terms, however, these statutes protect only those lands and waters of the State. *See* 27A Okla. Stat. § 2-6-105.A ("It shall be unlawful for any person to cause pollution in any waters of the state or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state."); 2 Okla. Stat. § 2-18.1.A ("It shall be unlawful and a violation of the Oklahoma Agricultural Code for any pollution of any air, land or waters of the state . . . .").

As explained above, Oklahoma has an adequate property interest in only whatever discrete pockets of land within the IRW that it actually owns or holds in trust. *See, e.g.*, *Tal*, 453 F.3d at 1254; *New Mexico*, 335 F. Supp. 2d at 1231-35. Further, Oklahoma's riparian laws grant individual landowners ownership rights to groundwater and diffuse surface waters. *See Messer-Bowers*, 8 P.3d at 879. Hence, Oklahoma does not have a legally cognizable interest as either an owner or trustee of most of the land and natural resources within the IRW. Accordingly, Plaintiffs' claim of nuisance *per se* (Count 4, FAC ¶¶ 103-04) must be dismissed.

D. Oklahoma Lacks Standing To Sue For Unjust Enrichment, Restitution, Or Disgorgement For Lands Or Waters It Does Not Own Or Hold In Trust

The State also seeks restitution and disgorgement for the alleged contamination of lands and natural resources within the Watershed. For the same reasons that the State lacks standing to

bring the trespass and nuisance claims, Oklahoma lacks standing to maintain this claim. Oklahoma alleges that the agricultural practices of independent poultry producers contracting with Defendants constitute an "enormous economic benefit and advantage" that exacts a "great cost to the lands and waters comprising the IRW . . . at the expense of, and in violation of, the State of Oklahoma's rights." FAC ¶ 142. Oklahoma claims this amounts to an involuntarily conferred benefit necessitating restitution and the disgorgement of the Defendants' profits. *Id.* ¶¶ 144-47. Oklahoma, however, can neither confer a benefit upon another nor claim its rights have been violated insofar as it cannot show that it owns the relevant lands or serves as a natural resource trustee.

Even if the traditional fertilization practices of which Oklahoma complains actually entail a "great cost to the lands and waters comprising the IRW," *id.* ¶ 142, Oklahoma cannot seek restitution and disgorgement for injuries caused by the alleged contamination of lands and waters that belong to another. *See Woodring v. Swieter*, 637 S.E.2d 269 (N.C. Ct. App. 2006) (granting summary judgment for defendant on plaintiff's unjust enrichment, trespass and nuisance claims for lack of standing because he did not own the property at issue); *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728 (Tex. Ct. App. – Texarkana 2003) (plaintiffs lacked standing to pursue claims of unjust enrichment, trespass and nuisance because environmental contamination occurred before plaintiffs owned property). To the extent that Oklahoma is neither an owner nor a trustee, it has suffered no injury and, therefore, lacks standing. *See, e.g.*, *Scharmer v. Carrollton Mfg. Co.*, 525 F.2d 95, 97-98 (6th Cir. 1975) (stockholder lacked standing to assert unjust enrichment claim belonging to another); *Deitz*, 2006 WL 3782902, at *4 (applying *Lujan*'s standing requirements to an unjust enrichment claim). Accordingly, Oklahoma's claim for restitution and disgorgement (Count 10, FAC ¶ 142-47) must be dismissed.

E. Plaintiffs Are Estopped By Their Own Strategic Refusal To Narrow The Scope Of Their Claims

As discussed above, Plaintiffs have steadfastly maintained that their claims encompass alleged injuries to all property and every natural resource within the entire 1,000,000-plus acres of the IRW, across state lines, federal boundary lines, and private property lines. *See, e.g.,* Transcript of Feb. 15 hearing, at 22, lines 8-9 ("THE COURT: So it's the whole watershed? MR. BAKER: That's our allegation, Your Honor."), 30, lines 16-18 ("THE COURT: What I hear the plaintiff saying is that the entire watershed is their facility and they want to make that clear."), Response in Opposition to Defendants' Motion for a More Definitive Statement (Dkt. No. 131) (Nov. 18, 2005); Response in Opposition to Defendants' Motion for Entry of a Case Management Order (Dkt. No. 978) (Nov. 13, 2006); Order and Opinion (Dkt. No. 1061), at 3 (Feb. 26, 2007). Plaintiffs are estopped by their own refusal to differentiate their asserted interests in IRW property ownership and trusteeship from the obvious ownership and trusteeship interests of others. Plaintiffs have forced this Court to choose between all or nothing. Because it is uncontradicted that Oklahoma does not have standing to assert property damage claims as to the entire IRW, it must be nothing. As a consequence, Counts 2, 4, 6 and 10 of the FAC must be dismissed.

IV. CONCLUSION

For the foregoing reasons, this Court should enter an order dismissing Counts 2, 4, 6 and 10 of Plaintiffs' FAC. As a minimum alternative, this Court should limit Plaintiffs' claims in Counts 2, 4, 6 and 10 to those discrete properties and natural resources within the portion of the IRW located in Oklahoma for which Oklahoma is the actual owner or trustee.

Dated: March 12, 2007

Respectfully submitted,

/s/ Jay T. Jorgensen
Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Timothy K. Webster, *appearing pro hac vice*
Jay T. Jorgensen, *appearing pro hac vice*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 (phone)
(202) 736-8711 (fax)

-AND-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405) 239-6766 (fax)

-AND-

Robert W. George, OBA #18562
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 (phone)
(479) 973-0007 (fax)

Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson
OFFICE OF ATTORNEY GENERAL
State of Oklahoma
2300 N. Lincoln Blvd, Suite 112
Oklahoma City, OK 73105
ATTORNEY FOR PLAINTIFF

David Phillip Page
James Randall Miller
Louis Werner Bullock
MILLER KEFFER & BULLOCK
222 S KENOSHA
TULSA, OK 74120-2421
ATTORNEYS FOR PLAINTIFF

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
502 W 6th St
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF

Robert Allen Nance
Dorothy Sharon Gentry
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
5801 N Broadway
Ste 101
Oklahoma City, OK 73118
ATTORNEYS FOR PLAINTIFF

A. Scott McDaniel
Chris A. Paul
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
JOYCE, PAUL & MCDANIEL, P.C.
1717 South Boulder Ave., Ste 200
Tulsa, OK 74119
ATTORNEYS FOR PETERSON FARMS, INC.

Theresa Noble Hill
John H. Tucker
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
POB 21100
100 W. 5th Street, Suite 400
Tulsa, OK 74121-1100
ATTORNEYS FOR CARGILL, INC., and CARGILL TURKEY PRODUCTION, INC.

R. Thomas Lay, Esq.
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
ATTORNEYS FOR WILLOW BROOK FOODS, INC.

I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

William H. Narwold **MOTLEY RICE LLC** 20 Church St., 17th Floor Hartford, CT 06103 **ATTORNEYS FOR PLAINTIFF**	Elizabeth C Ward Frederick C. Baker **MOTLEY RICE LLC** 28 Bridgeside Blvd Mount Pleasant, SC 29464 **ATTORNEYS FOR PLAINTIFF**
C. Miles Tolbert **SECRETARY OF THE ENVIRONMENT** State of Oklahoma 3800 North Classen Oklahoma City, OK 73118	

/s/ Jay T. Jorgensen
JAY T. JORGENSEN